IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4585 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.A.MEHTA and
MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

RK SHAH & CO

Versus

UNION OF INDIA

Appearance:

MR PARESH M DAVE for Petitioners
MR KETAN A DAVE for Respondent No. 1
MS AVANI S MEHTA for Respondent No. 2, 3

CORAM : MR.JUSTICE R.A.MEHTA and
MR.JUSTICE S.D.PANDIT

Date of decision: 15/10/97

ORAL JUDGEMENT

The petitioner claims that it is trading in Casein and is not a manufacturer of Casein and it does not undertake any manufacturing activity. It is further submitted that by amendment in Tariff Act, Chapter 35,

Note No.3 is added whereby labelling and relabelling from bulk packs to retail packs and adoption of any other treatment to render the product marketable to the consumer is artificially deemed to be manufacture and thereby it is sought to be brought under the Excise net under entry 84 and List I of Schedule 7. It is submitted that in reality there is no manufacture and no manufacturing activity and therefore under Entry 84 of the Constitution there is no legislative competence to charge the trading activity and non-manufacturing activity of the petitioner and that this Note No.3 added by the amendment is ultra vires and without legislative competence. It is further submitted that this is nothing but levy in the nature of sales tax which is a State subject.

2. The process undertaken by the petitioner is described in para 3.1(A) of the petition which reads as follows :

"3.1(A): The petitioners submit that the process undertaken in their unit may be detailed as follows :-

The Casein produced by villagers and dairies is purchased by the petitioner firm. The casein so purchased is always delivered to the petitioners in gunny bag packings. The gunny bags are opened and casein is segregated in different lots on the basis of the size of lumps of casein so purchased. Sieving is also undertaken for segregation of the lumps. Except the lots of casein which is in powder form or any other small granules form, other lots of bigger lumps are ground in a pulverizer. The ground and pulverized casein is also sieved again. All the lots of casein which are thus, ground and pulverized and also those where such process was not necessary are packed again in same gunny bag packings and sold in the market. The processes of manual cleaning and sieving are undertaken in case of all lots of casein whereas grinding (pulverizing) is undertaken in about 80% cases for converting lumps into small granules or powder. The photographs of these processes are enclosed and marked as Annexure 'A' to the present petition."

Chapter 34 of the Tariff Act covers products like starch,

glues and enzymes. Item No.35.01 covers casein and it reads as follows :

"35.01 Casein, Caseinets and other Casein derivatives; casein glues."

Note No.3 in Chapter 35 of the Tariff Act reads as follows :

"Note No.3 - In relation to products of this Chapter, labelling or re-labelling of containers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to 'manufacture'."

3. Strong reliance is placed on the judgment of learned single Judge of the Bombay High Court in the case of Extrusion Processers Pvt. Ltd. v. Assistant Collector of C.E., 1988 (36) ELT 531 (Bom.). In that case, it was held that printing and lacquering of aluminium tubes not amounting to manufacture of aluminium tubes or incidental or ancillary to such manufacture, would not amount to manufacture as contemplated in the constitutional provision of Entry 84, and the extended definition of manufacture by amendment was struck down as beyond the legislative competence of the Parliament.

4. The judgment of the Supreme Court in the case of Union of India v. Delhi Cloth and General Mills, AIR 1963 SC 791 was relied on to come to the conclusion that 'manufacture' implies a change, but every change is not manufacture and something more is necessary by way of transformation to a new and different article having distinct name, character and use must come into existence. It was held that if the process is a post manufacturing operational process, it would not fall within the definition of 'manufacture' at all.

5. For the purpose of legislative competence of the Parliament, it is not sufficient to confine oneself to entry 84 and the meaning of the word 'manufacture'. Here the meaning of the word 'manufacture' has been extended by virtue of the amendment and the legislative competence has to be gathered from all the entries in List I particularly residuary entry 97. Therefore, when the post-manufacturing operational process is to be taxed, the question will be whether it amounts to sales tax. If it does not amount to sale tax, it would be within the legislative competence of the Parliament. Admittedly, the levy is not on the sale, but levy is on the

processing (which may or may not amount to manufacture) and the tax is imposed irrespective of any sale on the processing of raw casein as described by the petitioner himself in para 3.1(A) of the petition as quoted hereinabove. It is a tax irrespective of any sale and even without there being any sale, the process having taken place the levy is being made. Therefore, it would not fall within the State entry of sales tax.

6. The Bombay High Court has also referred to the judgments of the Supreme Court in the case of Empire Industries v. Union of India, AIR 1986 SC 662 and Ujagar Prints v. Union of India, AIR 1987 SC 874. In the case of Extrusion Process Pvt. Ltd. (1979 ELT (J) 380, it was held that printing and lacquering were not even remotely connected with manufacture. It was a process independent of manufacture of the aluminium tubes. In para 45 of the judgment in Empire Industries (supra) the Supreme Court referred to the case of Aluminium Corporation of India Ltd. V. Coal Board, AIR 1959 Cal 222 where the objection was that although coal might be a material or commodity, it was not something which was produced or manufactured. The word 'produced' appearing in Entry 84 of List I of the Seventh Schedule, is used in juxtaposition with the word 'manufactured' and consequently it would appear to contemplate some expenditure of human skill and labour in bringing the goods concerned into the condition which would attract the duty. It was further observed that it was not required that the goods should be manufactured, in the sense that raw material should be used to turn out something different and it would still require that these should be produced in the sense that "some human activity and energy should be spent on them and these should be subjected to some processes in order that these might be brought to the state in which they might become fit for consumption". Therefore, the parties before the Supreme Court were held producers of coal. Thus the Supreme Court held that the extended definition of manufacture in the case of Empire Industries (supra) was covered by Entry 84. The Supreme Court further considered in para 46 the question of entry 97 and it was held that "in any event under Entry 97 of List I of the Seventh Schedule this would apply, if it is not under entry 84".

7. The learned counsel for the petitioner has submitted that para 46 of the said judgment of the Supreme Court has been considered by the Bombay High Court in the Extrusion Process case (supra) and the Bombay High Court has held that Entry 97 would not apply. The discussion is in para 11 to 13 and we reproduce these

paragraphs below :

"11. Mr Shah then submitted that if the item cannot fall within the scope of Entry No.84 of List I of Schedule VII to the Constitution, it can fall under the Residuary Entry being Entry No.97 of List of Schedule VII to the Constitution in that context. Mr Shah drew my attention to para 46 of the judgment in the case of Empire Industries Ltd, 1985 (20) ELT 179 (SC): AIR 1986 SC page 662.

12. I have read the said passage. In the said passage a certain contention was advanced on behalf of the petitioners has been dealt with. The argument was to the effect that since the item would not fall within the scope of Entry No.84 of List I of Schedule VII to the Constitution, it would fall within the scope of Entry No.97 of List I of Schedule VII to the Constitution. It was then submitted that there was no charging section for such an activity and as such the charge must fall and there cannot be any levy. This argument was considered to be based on misconception and negatived. There is no finding by the Supreme Court that in any event this item would fall under Entry No.97 of List I of Schedule VII to the Constitution. There is no discussion about the Entry No.97 in the whole of the judgment. Therefore, I am not prepared to accept this contention of Mr.Shah.

13. Mr Shah then drew my attention to a later judgment of the Supreme Court, being the case of Messrs Ujagar Prints v. Union of India, reported in 1987 (27) ELT 567 (SC) = AIR 1987 Supreme Court page 874. Here again, there is nothing that can favour the respondents. In one paragraph it is said that the case of Empire Industries Ltd. requires reconsideration on certain aspects of the case. The other passage on which Mr.Shah relied on is at para three of the judgment wherein there is a reference to Bombay Tyre International Ltd. 1983 ELT 1896 (SC) = AIR 1984 Supreme Court page 420. That is referred to for the purpose of saying that the assessable value of the manufactured goods is to be determined at the factory gate that is at the stage when the manufactured goods leave the factory gate of the processor and it cannot possibly included the selling profit of the

trader who subsequently sells the processed fabric. I am afraid, this authority cannot be of any assistance to the respondents. Bombay Tyre International Ltd. came to be decided, totally on a different principle in relation to post manufacturing expenses, and it is essentially a case under Section 4 of the said Act. It was nothing to do with Section 2(f) of the said Act."

The observation of the learned Judge of the Bombay High Court that there is no finding by the Supreme Court that in any event this item would fall under Entry 97, to our mind is not the correct reading of the judgment of the Supreme Court. The sentence we have quoted above clearly shows that the Supreme Court has held that Entry 97 would apply even if it is not under Entry 84. Even though there may not be elaborate discussion, there is a clear finding. In our view, the observations made in para 36, 44, 45 & 46 of the Supreme Court judgment in the case of Empire Industries (supra) given a clear reason and the Supreme Court has clearly appreciated that there might be processes independent of the manufacture or process subsequent to manufacture or post manufacturing processes, but when such processes are to be taxed, they would fall in Entry 97 if not in Entry 84. Even independently of this, it appears to us that when any processing of goods even if it is post manufacturing and is to be taxed, the only competent legislature would be central legislature because it is a tax on processing and not tax on sale. Therefore, even if such process might not amount to manufacture and therefore is not covered by Entry 84, it would be covered by Entry 97.

8. In case of Ujagar Prints (supra), the Empire Industries case was referred to in para 19 and it is clearly held as follows :

"19. At all events, even if the impost on process is not one under Entry 84, List I, but is an impost on "processing' distinct from "manufacture" the levy could yet be supported by Entry 97, List I, even without the aid of the wider principle recognised and adopted in Dhillon's case (AIR 1972 SC 1061). It was, however, contended that the levy of tax on an activity which cannot be reasonably be regarded as an activity of 'manufacture' cannot be described as a levy of duties of excise under Entry 84, List I. If it is a non-descript tax under Entry 97, the Parliament, it is urged, has

not chosen to enact any such law in this case. The charging section does not, it is urged, bring such a taxable-event to charge. This argument was noticed in Empire Industries case thus:

"..... It was then argued that if the legislation was sought to be defended on the ground that it is a tax on activity like processing and would be covered by the powers enumerated under Entry 97 of List I of the Seventh Schedule then it was submitted that there was no charging section for such an activity and as such the charge must fail, and there cannot be any levy....."

The contention was rejected holding:

"..... This argument proceeds on an entire misconception. The charging section is the charging Section 3 of the Central Excises and Salt Act, 1944. It stipulates the levy and charge of duty of excise on all excisable goods produced, or manufactured. "Manufactured" under the Act after the amendment would be the 'manufacture' as amended in Section 2(f) and Tariff Items 19-1 and 22 and the charge would be on that basis. Therefore, it is difficult to appreciate the argument that the levy would fail as there will be no appropriate charging section or machinery for effectuating the levy on the activity like the method of processing even if such an activity can be justified under Entry 97 of List I of Seventh Schedule. We are, therefore, of the opinion that there is no substance in this contention.....

We respectfully agree.

20. If a legislation purporting to be under a particular legislative entry is assailed for lack of legislataive-competence, the State can seek to support it on the basis of any other entry within the legislative competence of the legislature. It is not necessary for the State to show that the legislature, in enacting the law, consciously applied its mind to the source of its own competence. Competence to legislate flows from Articles 245, 246 and the other Articles following, in Part XI of the Constitution. In defending the validity of a law questioned on ground of legislative-competence, the State can

> always show that the law was supportable under any other entry within the competence of the legislature. Indeed in supporting a legislation sustenance could be drawn and had from a number of entries. The legislation could be a composite legislation drawing upon several entries. Such a "rag-bag" legislation is particularly familiar in taxation."

This judgment of the Supreme Court is referred to by the Bombay High Court in para 13 of its judgment. But it has been dealt with by stating that "there is nothing that can favour the respondents" We are unable to agree with the said conclusion. We find that in the case of Ujagar Prints (supra), the Supreme Court has clearly laid down that residuary Entry 97 would cover the cases of impost on process or processing distinct from manufacture under Entry 84 (See para 19 of the judgment of the Supreme Court).

9. In Union of India vs. H.S. Dhillon AIR 1972, SC 1061, it was held that there is nothing in the Constitution to prevent the Parliament from combining its power under Entry 86 with powers under Entry 97 of List I and there is no principle which debars Parliament from relying on the powers under specified Entries 1 to 96 and supplement them with the powers under Entry 97 and for that matter, powers under Entries in the Concurrent List.

10. The learned counsel for the petitioner has submitted that in any case there would not be any charging section for charging the post manufacturing process and activities. Section 3 of the Act which is the charging section charges manufacture of goods and in the present case, it is submitted that the activity and process would be post-manufacturing process and therefore in absence of any charging section, there is no levy. It is impossible to agree with such an argument. By Note No.3, which we have upheld, the definition of manufacture is extended and the charging section operates for the purpose of taxing, manufacture as defined and included in the extended definition of manufacture. Therefore, there is no need of any new charging section for the extended manufacturing activity.

10. Thus, we find that in substance the levy is covered by Union List I and not covered by the Entry of Sales Tax under State List II. Hence the petition fails and is dismissed. Notice discharged.

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(vjn)